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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 445

THE FIRST NATIONAL BANK IN HOUSTON,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims dated July 12, 1955 (Pet. App. 15–24) is reported at 133 F. Supp. 381. The findings of fact and conclusion of law of that court (Pet. App. 24–48) are not yet reported.

JURISDICTION

The judgment of the United States Court of Claims was entered on July 12, 1955. The petition for a writ of certiorari was filed October 4, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

INTEREST OF THE UNITED STATES

This petition raises the question of whether certain funds concededly owed to a bankrupt contractor by the United States should be awarded to the contractor's sureties or to the bank to which he assigned these funds. Owing to the particular circumstances of the case and to the procedure adopted by all parties in order to minimize the issues, the United States has no financial interest in the outcome of this particular case (see *infra,* pp. 6–8).

At this time, we do not know and thus cannot state what the interests of the Government would be in a situation in which it was not merely a stakeholder, but had various possible claims and set-offs against the funds in its hands. In such cases, the relative priorities of surety or bank might substantially affect the ultimate rights of the Government. Obviously many complex variables are potentially involved. No abstract rule can be properly formulated to cover every case in which surety and bank are disputing their relative priorities to amounts owing under Government contracts.

Indeed, the basic problems inherent in this type of litigation, involving the proper interpretation of the Assignment of Claims Act of 1940 (App. *infra,* pp. 16–18), begin to emerge only when the dispute concerns not only the rights of the bankrupt contractor's surety and assignees, but the

varied claims and set-offs of the Government. So far as the United States is concerned, this Court should not, we submit, review these problems on the basis of a record which fails to present the indispensable concrete factual background necessary to determine the interests of the Government.

Thus, we oppose the granting of the petition for a writ of certiorari, because (1) the case does not constitute a proper vehicle for an authoritative determination of the broad underlying issues; (2) the limited issue presented appears to have been correctly decided; and (3) contrary to petitioner's contention, no true conflict of decisions is involved.

STATUTES INVOLVED

In pertinent part, the following statutes are set forth in the Appendix, *infra,* at pp. 15–19: Section 3477 of the Revised Statutes (App. *infra,* p. 15); the Assignment of Claims Act of 1940, as amended, 54 Stat. 1029, 65 Stat. 41, 31 U. S. C. 203 (App. *infra,* pp. 16–18); and Section 1 (a) of the Miller Act, 49 Stat. 793, 40 U. S. C. 270a (a) (App. *infra,* pp. 18–19).

STATEMENT

Two surety companies, after discharging a defaulting contractor's obligations to laborers and material men pursuant to payment bonds, brought suits in the United States Court of

Claims asserting subrogation and other rights to the unpaid balance owed by the United States to the contractor. Petitioner, the First National Bank in Houston, became a party to these suits, claiming rights under an assignment given by the contractor to secure loans from the bank. During the litigation the government reached an agreement with all three claimants as to the net amount finally owing to the contractor, and thereafter was relegated to the position of a stakeholder. The Court of Claims held that the subrogation rights of the surety companies were superior to the rights of petitioner, and on July 12, 1955, entered judgment in favor of the sureties.

The facts relating to the litigation may be summarized as follows:

1. *The contracts involved.* In November 1949, Thomas Bryan and Associates, Inc. (the "contractor") contracted with the Atomic Energy Commission for the construction of a steam and electric plant. The surety bonds required by Section 1 (a) of the Miller Act (App. *infra*, pp. 18–19) were furnished by the Fidelity and Deposit Company of Maryland. (Fdgs. 24–26, Pet. 36.) About a year later, in September 1950, the contractor entered into a second contract with the Atomic Energy Commission. The surety on this contract was the National Surety Corporation (Fdgs. 1–3, Pet. 24–25.)

On January 30, 1950, the contractor made a general assignment of its accounts receivable to petitioner pursuant to the provisions of the Texas Civil Statutes (Fdg. 13, Pet. 29). On January 21, 1951, the contractor assigned to petitioner its claims under the two Atomic Energy Commission contracts in compliance with the provisions of the Assignment of Claims Act of 1940 (App. *infra*, pp. 16–18) (Fdg. 17, Pet. 32–33).

On March 3, 1951, the Government accepted the September 1950 contract as completed (Fdg. 5, Pet. 26). The adjusted price for the contract amounted to $609,618.73; the Government paid the contractor $501,617.26 (Fdgs. 2, 6, Pet. 25, 26). The unpaid balance on this contract thus amounted to $108,001.47, and after the deduction of $7,083.13, representing claims of the Government against the contractor arising out of the inadequate performance of the contract (Fdg. 7, Pet. 27),[1] to $100,918.34 (Fdg. 50, Pet. 46). The surety under this contract, National Surety Corporation, had to pay outstanding claims of laborers and material men in the amount of $295,255.64 (Fdg. 9, Pet. 27).

On February 23, 1951, the contractor stopped work on the November 1949 contract. The Government relet the contract at a cost of $192,621.56.

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[1] The contractor also was indebted to the Government in the amount of $45,429.58 for withholding taxes (Fdg. 8, Pet. 27).

(Fdgs. 27–29, Pet. 38–39.) The Government paid the contractor $1,434,992.60 of the adjusted price of $1,705,295.55 (Fdgs. 24, 32, Pet. 36, 40). The unpaid balance thus amounted to $270,302.95. Apart from the cost of reletting the contract and the withholding taxes referred to above (*supra*, fn. 1), the Government asserted additional miscellaneous claims in the amount of $11,764.78 (Fdg. 30, Pet. 39), and liquidated damages for the delay in the construction of two turbo-generator units and of telephone facilities. These liquidated damages amounted to $63,075.00, if computed as of the day of the contractor's default, and to $103,475.00, if computed as of the day of completion, including such damages for the delay in the completion of the telephone facilities amounting to $675.00 (Fdg. 34, Pet. 40–41). Fidelity and Deposit Company of Maryland, the surety on this contract, had to disburse $341,769.86 to laborers and material men who had not been paid (Fdg. 35, Pet. 41).

2. *The proceedings below.* The two sureties brought two separate actions in the Court of Claims (Nos. 419–52 and 149–53) [2] for the unpaid balances on the two contracts, claiming to be entitled to those sums both by way of subrogation and

[2] National Surety Corporation, the surety under the September 1950 contract, filed Petition No. 419–52 (R. 1–8). Fidelity and Deposit Company of Maryland, the surety under the November 1949 contract, filed Petition No. 149–53 (R. 53–62).

by express assignment. Petitioner, the First National Bank in Houston, claiming under its express assignments, joined both proceedings.[3] After the consolidation of the two proceedings (R. 99), all parties concerned, *i. e.,* the surety companies, the bank, and the United States, entered into a Stipulation of Facts and Stipulation of Settlement (R. 101–178).

Pursuant to the latter, the parties agreed that there remained due and unpaid on the November 1949 contract a net amount of $65,241.61[4] and on the September 1950 contract a net amount of $100,918.34,[5] totalling $166,159.95, and that the United States was entitled to a credit of $45,429.58, representing withholding taxes owed by the contractor to the Government.[6] Agreement having been reached on the amount of the liability of the United States, *i. e.,* $120,730.37, it was stipulated that the United States should hold this sum:

> * * * pending the determination in these proceedings of the respective rights of the

[3] In No. 419–52 petitioner filed a petition and answer (R. 13); in No. 149–53 it submitted a formal petition for leave to intervene before it filed its petition and answer (R. 67, 70).

[4] *I. e.*, the unpaid balance of $270,302.95 less $192,621.56 completion cost, $11,764.78 miscellaneous charges, and $675.00 liquidated damages (cf. *supra*, pp. 5–6 and R. 172–173).

[5] Cf. *supra*, p. 5 and R. 170–171.

[6] Cf. *supra*, p. 5, fn. 1, and R. 170–171.

> plaintiffs and the First National Bank in Houston and the entry of an appropriate judgment by the Court determining such rights. [R. 173.]

The stipulation finally recited that it was made for the purpose of enabling the court to determine the respective rights of the sureties and the bank and that judgment should be entered for the party or parties determined to have the superior right (R. 174). The United States accordingly filed a memorandum in the Court of Claims stating that it would not file a brief since the controversies had been settled in so far as it was concerned (R. 181).

3. *The judgment below.* The Court of Claims decided in favor of the sureties (Pet. 15–24). In so holding, it relied on decisions of this Court, such as *Prairie State Bank* v. *United States,* 164 U. S. 227; *Henningsen* v. *United States Fidelity and Guaranty Co.,* 208 U. S. 404; *United States* v. *Munsey Trust Co.,* 332 U. S. 234, which recognize that, usually, the equities of a surety are superior to the rights of a money lender acquired by way of assignment (Pet. 16–21). The Court of Claims concluded that the Assignment of Claims Act of 1940 (App. *infra,* pp. 16–18) was not designed to, and did not affect, this generally recognized order of priority (Pet. 20–21), although assuming (Pet. 24) that its decision conflicted with the view taken by the Fifth Circuit in *Coconut Grove Exchange Bank* v. *New*

Amsterdam Casualty Co., 149 F. 2d 73, and *General Casualty Co.* v. *Second National Bank of Houston*, 178 F. 2d 679.

The opinion of the Court of Claims states: "it does not affirmatively appear in this case whether or not the money borrowed from the bank was used in the performance of these contracts, and, if so, which of the two" (Pet. 20–21; cf. Fdg. 19, Pet. 35 and Fdg. 43, Pet. 45). Petitioner appears to challenge the accuracy of this statement, asserting that the "record here is clear that the bank made the loans to and advanced the funds to the contractor to assist and enable it to carry on and perform its contracts with the [Government]" (Pet. 7). However, petitioner gives no record reference to support its assertion; no finding to this effect was made; and the record designated by petitioner for certification to this Court contains neither evidence nor fact stipulation to sustain this claim.

DISCUSSION

We submit that the petition for a writ of certiorari should be denied. The case does not appear to be the proper vehicle for determining the effect of the Assignment of Claims Act on the relative rights of surety and bank. Furthermore, the decision below appears to be correctly decided in accord with controlling precedent,[7] and there is no true conflict.

[7] Cf. *supra*, p. 8.

1. *The instant case does not present a proper vehicle to determine the effect of the Assignment of Claims Act.* As already shown, the United States has no financial stake in the outcome of this particular litigation. Ordinarily, this circumstance would lead us to refrain from taking a position as to whether or not the petition for a writ of certiorari should be granted. These normally applicable considerations, however, do not apply in this area of the law where all depends upon the nature and origin of the right claimed and upon the person who presents it. Cf. *United States* v. *Munsey Trust Co.*, 332 U. S. 234.

The instant case is unique and unrepresentative because it does not encompass the varied claims of the Government against the parties and their predecessors in interest, and the issues of the relative priorities between surety, bank, and Government. A decision here would be of extremely limited precedential value and would solve only part of the complex problems which are normally presented in this type of litigation. Indeed, in view of the highly technical legal rules here involved, it is quite possible that the relative rights of the parties were substantially affected by the stipulations of fact and settlement, and by the resulting absence of any claims of the United States.

Moreover, the effect, if any, of the Assignment of Claims Act of 1940, as amended (App. *infra*,

pp. 16–18), on the relative rights of sureties and assignees should not, we submit, be decided in a case in which the United States has merely an academic interest.

2. *The decision below is not in conflict with the rulings of this Court or of the circuits.* Contrary to petitioner's assertion, the holding of the Court of Claims does not conflict, either as to holding or in principle, with *Central Bank* v. *United States,* 345 U. S. 639, or *Martin* v. *National Surety Co.,* 300 U. S. 588, the two decisions of this Court cited by petitioner as being in "direct conflict" (Pet. 2) with the "opinion" of the court below. The *Central Bank* case did not involve any question of the rights of a surety, and this Court, in its opinion, did not consider this problem. Although the *National Surety* case involved a somewhat different type of fact situation, it, like the decision below, sustained the surety's contention that its equity was superior to that of a creditor who had advanced money to a contractor with knowledge of the surety's rights.

Likewise, the other decisions cited by petitioner (Pet. 2) are clearly distinguishable on the facts. They appear to be cited primarily for the unchallenged general proposition that the Assignment of Claims Act (App. *infra,* pp. 16–18) is to be interpreted so as to carry out its purpose, *i. e.,*

to encourage and facilitate the private financing of Government contracts.[8]

Furthermore, as this Court indicated in *United States* v. *Munsey Trust Co.*, 332 U. S. 234, the relative precedence of the rights of surety, assignee, and the Government is not absolute, but depends to a large extent upon the origin and nature of the right claimed and on the party which asserts it. As we read the decisions of the Fifth Circuit, they do not purport to hold that the assignee-bank's rights always have priority over those of the surety. They are limited to a very narrow issue, and hold specifically that where, prior to his default, a contractor assigns *progress payments* under a contract to a bank as security for a loan to be used for the specific purpose of payment of the laborers and material men, and where the bank can show[9] that no part of this loan was diverted from such payments to the laborers and material men under that particular contract, the bank's rights are not subordinated to the surety's equities; the reason being that the surety got the full benefit of the arrangement.

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[8] Of course similar considerations govern the construction of the Miller Act (App. *infra*, pp. 18–19), which was designed to give protection and security to those who furnish labor and materials for public works. *Standard Insurance Co.* v. *United States*, 302 U. S. 442, 444; *MacEvoy Co.* v. *United States*, 322 U. S. 102, 104.

[9] *Town of River Junction* v. *Maryland Casualty Co.*, 133 F. 2d 57, 58 (C. A. 5).

Town of River Junction v. *Maryland Casualty Co.*, 110 F. 2d 278, 281, certiorari denied, 310 U. S. 634, 133 F. 2d 57; indeed, *General Casualty Co.* v. *Second National Bank of Houston*, 178 F. 2d 679, 680 (C. A. 5), states specifically that in other situations the bank's rights would be subordinate to those of the surety.[10]

Petitioner, moreover, has failed to show that it even comes within the narrow confines of the Fifth Circuit rule. Nothing in the present case indicates that the funds in the hands of the United States represented progress payments. Furthermore, as the Court of Claims specifically pointed out in its opinion (Pet. 20–21; see *supra*, p. 9), there was no showing that the funds advanced by petitioner to the contractor were used by it to pay the laborers and material men on the two contracts here involved.[11]

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[10] *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Co.*, 149 F. 2d 73 (C. A. 5) appears to have a somewhat broader scope. However, this opinion must be read against the background of the far more limited holdings of *Town of River Junction* v. *Maryland Casualty Co.*, *supra*, and *General Casualty Co.* v. *Second National Bank of Houston*, *supra*, which preceded and followed it, respectively.

[11] Petitioner argues (Pet. 13) that according to *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Co.*, 149 F. 2d 73, 79 (C. A. 5), the surety had the burden of proving that the loans had been diverted. However, as Judge Sibley pointed out in his strong dissent (149 F. 2d at 80), the Fifth Circuit had held only two years previously in *Town of River Junction* v. *Maryland Casualty Co.*, 133 F. 2d 57, 58 that the bank has the burden of

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1955.

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proof. Moreover, as we have shown in fn. 10, *supra*, the scope of the *Coconut Exchange Bank* case has been narrowed severely by *General Casualty Co.* v. *Second National Bank of Houston*, 178 F. 2d 679. Indeed, in that case the Court of Appeals stressed the finding by the District Court that from the weight of the evidence none of the advanced funds had been diverted (178 F. 2d at 680). We doubt whether the question as to which party has the burden of proof presents an issue of sufficient importance to warrant review by this Court; especially where it represents merely an intra-circuit conflict—not connected with this case—which probably has come to rest even within the Fifth Circuit.

APPENDIX

Statutes Involved

1. *R. S. Section 3477:* Prior to the passage of the Assignment of Claims Act of [October 9] 1940, Section 3477 of the Revised Statutes, now found, as amended, in 31 U. S. C. 203, provided:

> Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.[1]

[1] An amendment of May 27, 1908, 35 Stat. 411, incorporated into 31 U. S. C. 203 is not here relevant and is omitted.

2. *The Assignment of Claims Act of 1940:* Section 1 of this Act, 54 Stat. 1029, as amended May 15, 1951, 65 Stat. 41, 31 U. S. C. 203, in pertinent part provides:

* * * * *

> The provisions of [Section 3477 of the Revised Statutes] * * * shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*
>
> 1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;
>
> 2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;
>
> 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;
>
> 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a

true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940, as amended, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys

due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this Act, as amended, shall be deemed to affect or impair rights or obligations heretofore accrued.

3. *The Miller Act:* Section 1 (a) of the Miller Act of August 24, 1935, 49 Stat. 793, 40 U. S. C. 270a (a), in pertinent part provides:

> [B]efore any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to

any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. * * *

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